

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION**

MOBILE BAYKEEPER, INC.,

Plaintiff,

v.

ALABAMA POWER COMPANY,

Defendant.

Case No.: 1:22-cv-00382-KD-B

**NOTICE OF FILING DEMONSTRATIVE PRESENTATION
FROM THE DECEMBER 12, 2023 HEARING**

Defendant Alabama Power Company (“Alabama Power”) files into the record the attached demonstrative PowerPoint slides (Exhibit A) used by Alabama Power during the hearing on ripeness and standing held on December 12, 2023.

The PowerPoint slides are simply a demonstrative that aids the Court in understanding Alabama Power’s surface water testing and the locations of Mobile Baykeeper’s individual members’ properties in relation to the Plant Barry Ash Pond. Further, including the PowerPoint in the record will enable this Court, any reviewing court, and counsel to better follow the transcript of the hearing as counsel referred to the PowerPoint throughout the hearing. *See generally Michigan Carpenters’ Pension Fund v. Rayonier Advanced Materials, Inc.*, No. 3:18-CV-771-J-34JRK, 2019 WL 1429667, at *3 (M.D. Fla. Mar. 29, 2019) (relying on charts as a demonstrative

exhibits). And this Court may apply *Twombly* and take judicial notice of facts at the Rule 12(b)(1) stage.¹

/s/ Ed R. Haden

One of the Attorneys for the Defendant Alabama Power
Company

¹ See *Pennsylvania Nat. Mut. Cas. Ins. Co. v. St. Catherine of Siena Par.*, No. CIV.A. 13-00066-KD-M, 2014 WL 1048520, at *1 (S.D. Ala. Mar. 18, 2014) (“The standard of review for a Rule 12(b)(1) motion to dismiss for lack of subject-matter jurisdiction is the same as the standard of review for a Rule 12(b)(6) motion to dismiss attacking the legal sufficiency of the complaint.” (citing *Carmichael v. Kellogg, Brown & Root Servs., Inc.*, 572 F.3d 1271, 1279 (11th Cir. 2009))). The Supreme Court explained that “[t]o survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting and explaining its decision in *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)); *Wilson v. Cleveland Bros., Inc.*, No. 3:22-CV-90-ECM-CWB, 2022 WL 17371150, at *2 n.2 (M.D. Ala. Oct. 4, 2022), report and recommendation adopted, No. 3:22-CV-90-ECM, 2023 WL 105084 (M.D. Ala. Jan. 4, 2023) (“It is proper to judicially notice certain types of facts when considering an attack on subject matter jurisdiction under Rule 12(b)(1).”); *United States v. Burroughs*, 810 F.3d 833, 835 n.1 (D.C. Cir. 2016) (taking judicial notice of Google map whose “‘accuracy [could not] reasonably be questioned’” (quoting Fed. R. Evid. 201(b))); *ServisFirst Bank v. Harding Enterprises, LLC*, No. 2:17-CV-00605-AKK, 2018 WL 3056687, at *1 n.1 (N.D. Ala. Mar. 26, 2018) (taking judicial notice of “[a]n online Google Maps search show[ing] that the distance between Nicholson's business address and the location specified for the deposition is approximately seven miles”); *United States v. Underwood*, 344 F. Supp. 486, 488 (M.D. Fla. 1972) (“The Court takes judicial notice that Weeki Wachee River connects with the Gulf of Mexico and thereby forms a public highway thereto.”); *Seufferle v. MacFarland*, No. 1639, 1906 WL 19607, at *5 (D.C. Cir. June 13, 1906) (“Though it is not in the record, the court may take judicial notice of the course of nature, of the location of the falls of the Potomac, near Washington, where the velocity of the current of a great river is first impeded by the tide”); *Bruner v. Geneva Cnty. Forestry Dep’t*, 865 So. 2d 1167, 1176 (Ala. 2003) (per Harwood, J.) (“We take judicial notice that the Pea River flows south through Coffee County, Alabama, for many miles and that the Choctawhatchee River flows south through Dale County for many miles and that they converge in Geneva County just below the City of Geneva, to continue flowing into Florida as the Choctawhatchee River.”); *United States v. Howard*, 28 F.4th 180, 186 n.2 (11th Cir. 2022) (“[S]he surrendered her medical license. That fact is not included in the record, but we can take judicial notice of it as a publicly available state agency record.”), *cert. denied sub nom. Bramwell v. United States*, 143 S. Ct. 165 (2022); *Long v. Slaton*, 508 F.3d 576, 578 n.3 (11th Cir. 2007) (taking judicial notice of an investigative report from the Alabama Bureau of Investigation).

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CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of December 2023, a copy of the foregoing was filed using the Court's CM/ECF system, which sends an electronic notice to all counsel of record.

/s/ Ed R. Haden

Of Counsel

Exhibit A

Mobile Baykeeper, Inc. v. Alabama Power Co.
Standing and Ripeness Hearing
December 12, 2023

Mobile River Testing – Upstream/Downstream

Alabama Power tests the Mobile River upstream and downstream of the Ash Pond and reports the results to ADEM:

Arsenic Level (ppb)

2023	<.5
2022	<.5
2021	<.5
2020	<.5

Mobile River Testing

Notes:

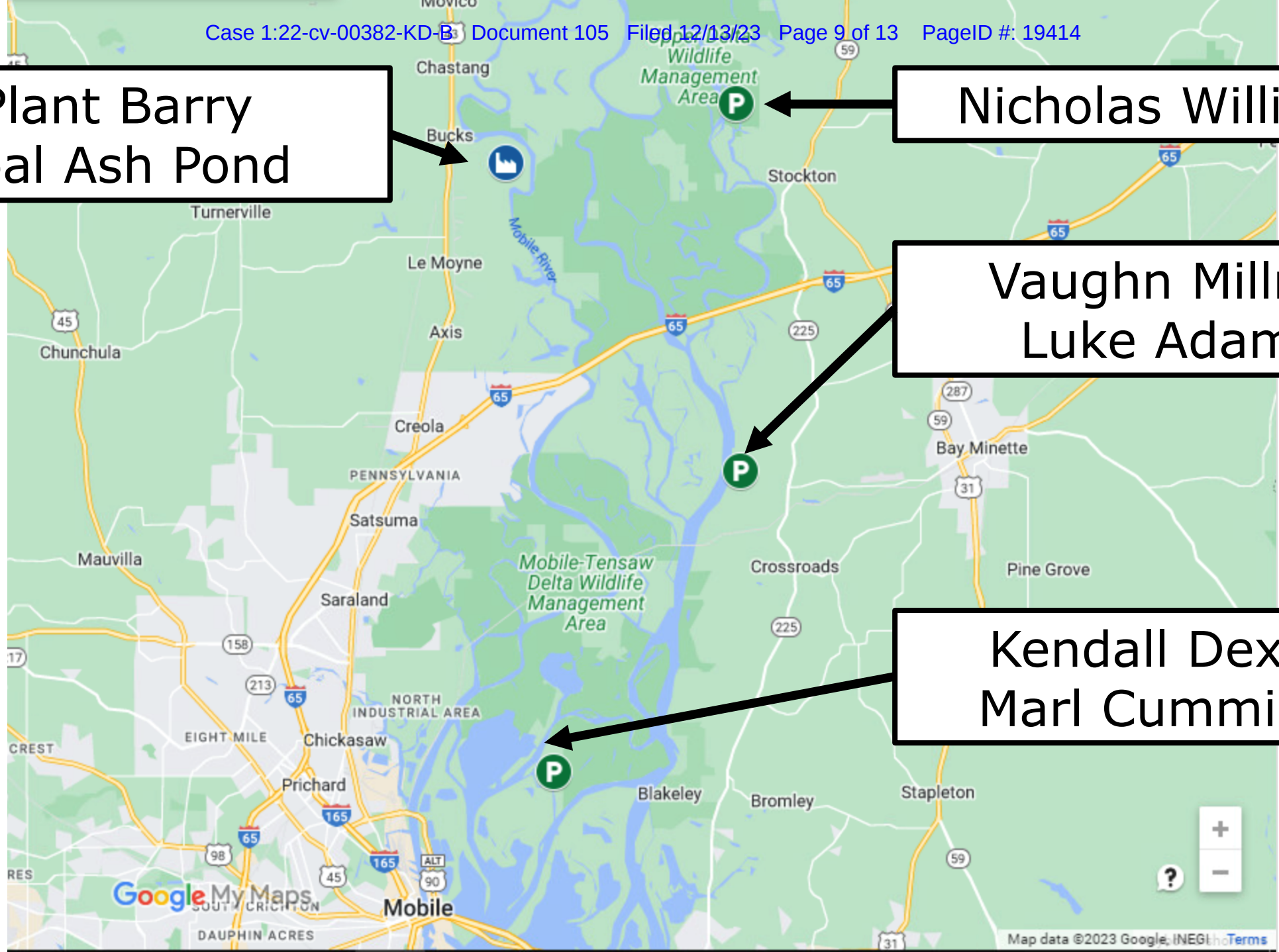
- The RL or “reporting limit” is the lowest level Alabama Power’s ADEM-approved testing method can detect. We cannot reliably detect a concentration any lower than that. For Arsenic III (trivalent arsenic), the reporting limit is 0.5 parts per billion, which is just higher than the surface water quality standard of 0.303 parts per billion.
- The reporting limit is the best we can do under the protocol ADEM has approved. We have filed the results for 41 consecutive months with ADEM, which makes them available on ADEM’s website. This information provides no basis for any health concern and is the best available information regarding water quality in this area of the Mobile River.

Plant Barry
Coal Ash Pond

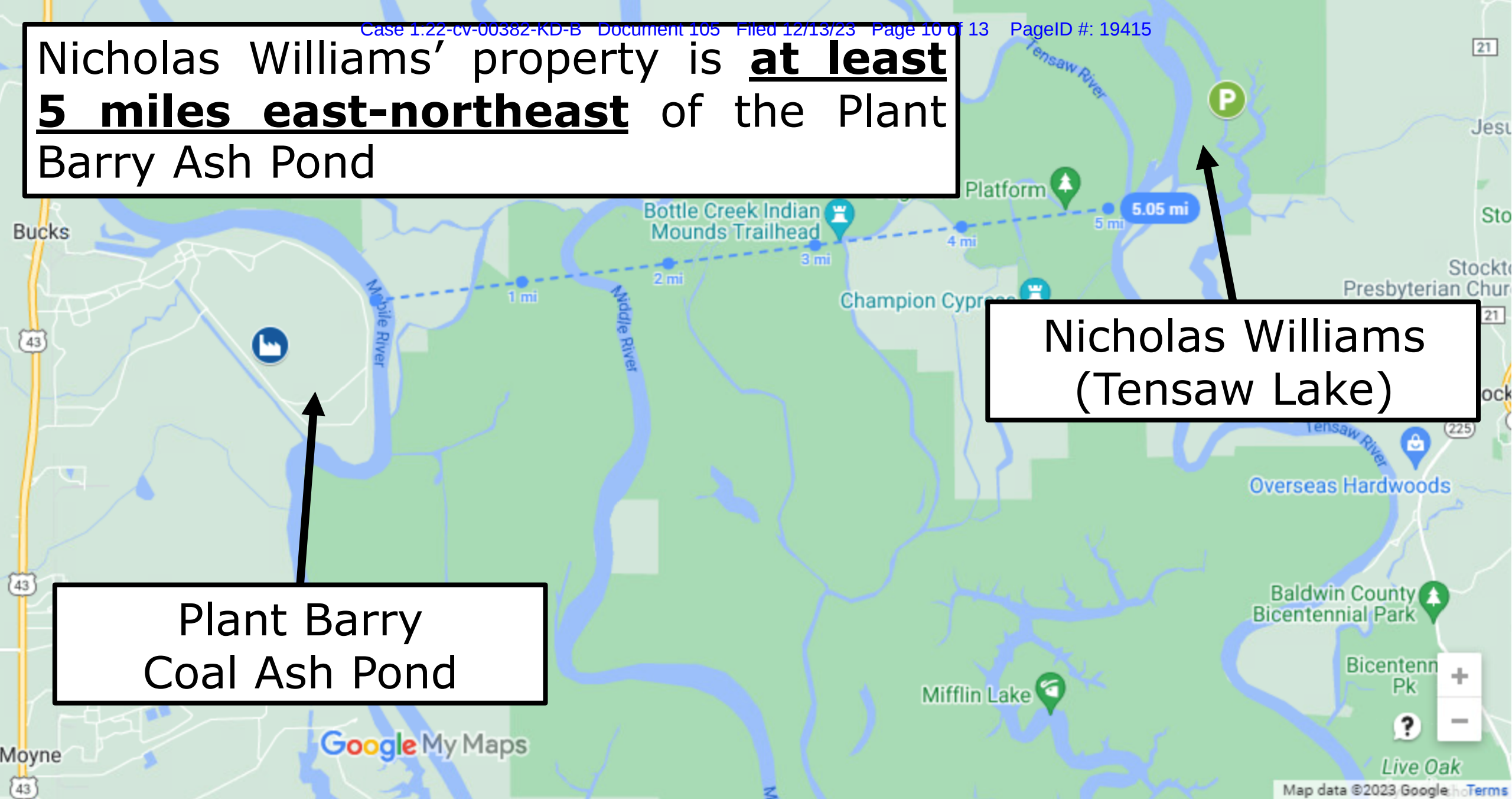
Nicholas Williams

Vaughn Millner
Luke Adams

Kendall Dexter
Marl Cummings

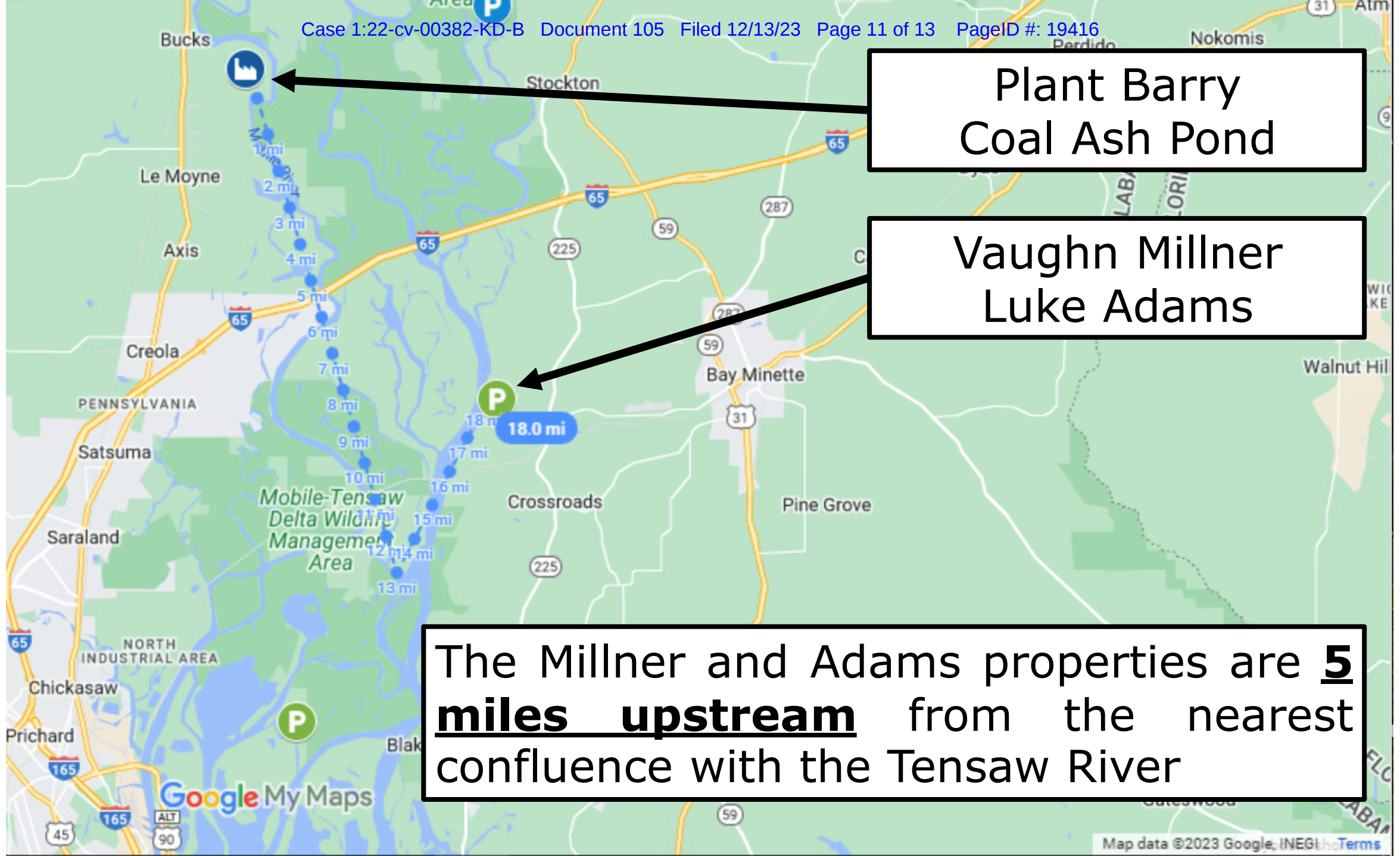


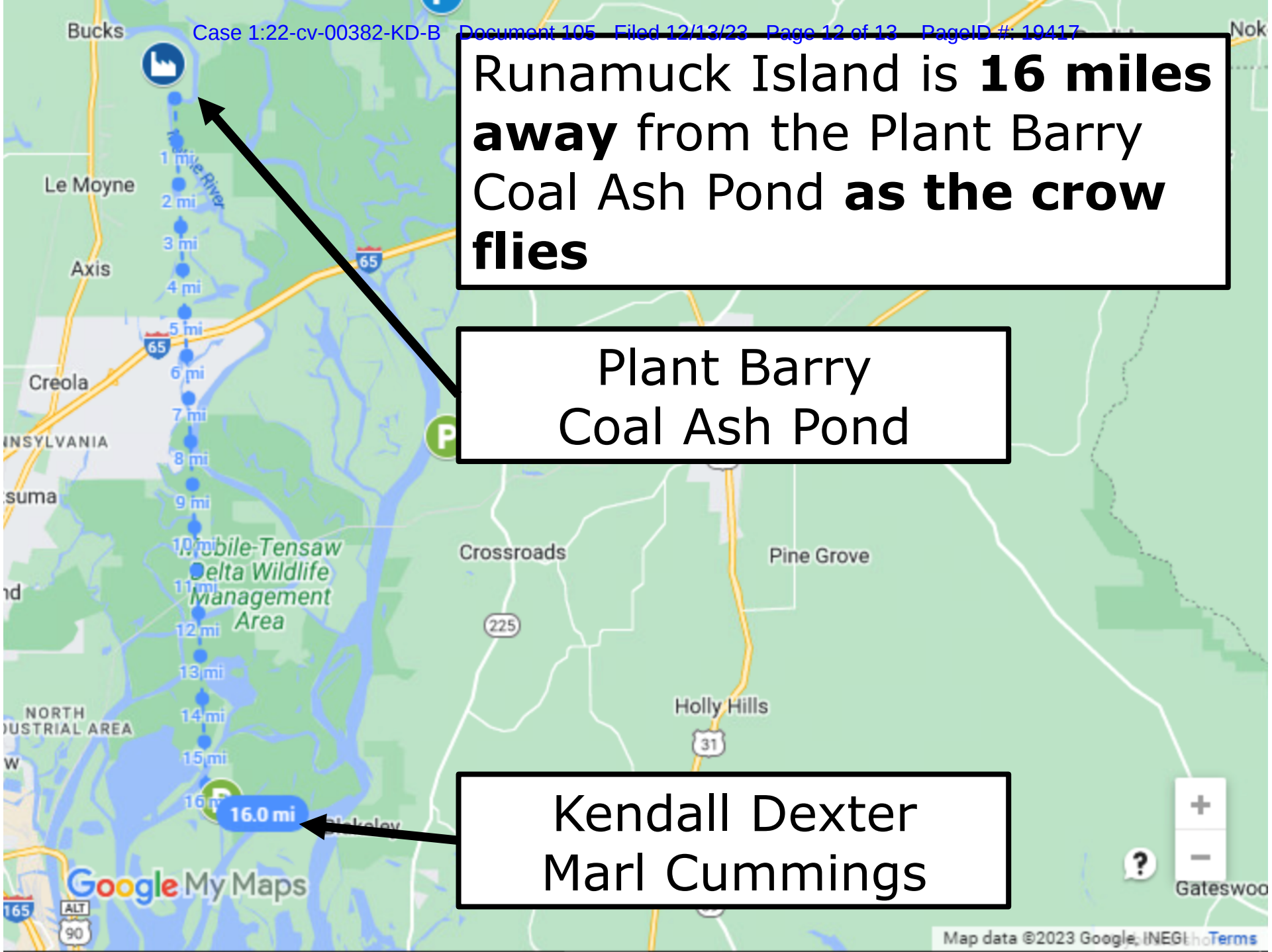
Nicholas Williams' property is **at least 5 miles east-northeast** of the Plant Barry Ash Pond

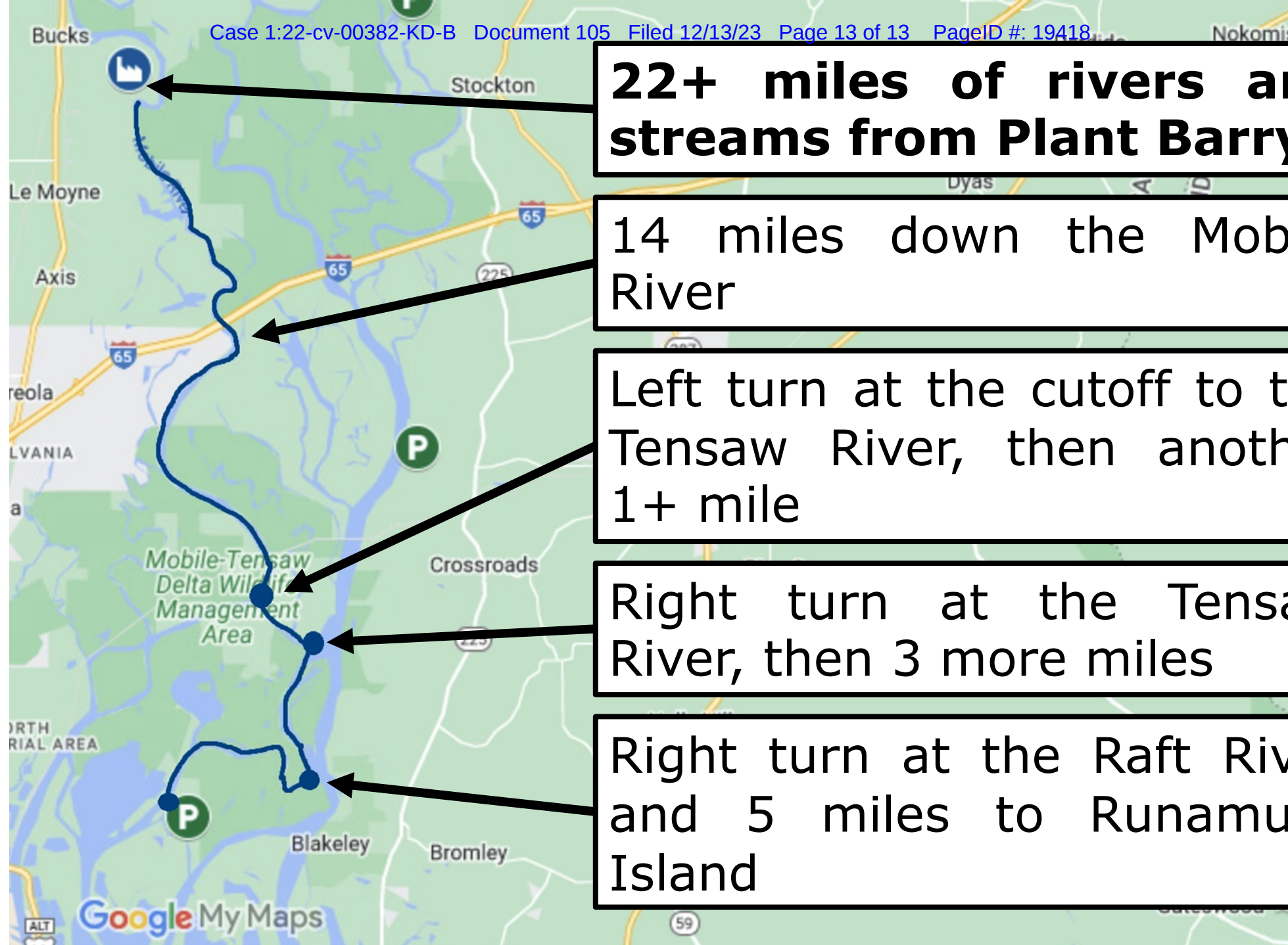


Nicholas Williams
(Tensaw Lake)

Plant Barry
Coal Ash Pond







22+ miles of rivers and streams from Plant Barry:

14 miles down the Mobile River

Left turn at the cutoff to the Tensaw River, then another 1+ mile

Right turn at the Tensaw River, then 3 more miles

Right turn at the Raft River and 5 miles to Runamuck Island